IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD STANLEY WADLEY, Appellant, vs. PEOPLE OF THE STATE OF CALIFORNIA, LOUIS S. NELSON, Warden, San Quentin State Prison, Appellees.	)	No. 22599

APPELLEES' BRIEF

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JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for writ of habeas corpus was invoked under Title 28 United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes an order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has issued.

STATEMENT OF THE CASE

Appellant is appealing from an order of the United States District Court for the Northern District of California denying his petition for writ of habeas corpus.

A. Proceedings in the State Courts.

On February 5, 1963, appellant was convicted of a violation of section 11530 of the California Health

and Safety Code, a felony (TR 57).[1/] On February 19, 1965, appellant was placed on parole (TR 115). He was thereafter on March 22, 1966, convicted of robbery in violation of California Penal Code section 211 and further found to have suffered the prior felony conviction (TR 58). By a report filed on March 25, 1966, appellant was charged with three violations of his parole agreement: (1) That he violated the conditions of his parole by committing robbery as evidenced by the conviction for that crime. (2) That he violated the conditions of his parole by having an automatic pistol in his possession. (3) That he violated the conditions of his parole by associating with parolees and numerous other persons of ill repute in the community (TR 170-173). On March 31, 1966, appellant's parole was cancelled (TR 168, 169). Petitioner appealed the robbery convition to the California Court of Appeal, and said conviction was affirmed on April 27, 1967 (TR 30-39). Appellant did not file habeas corpus petitions in the state courts raising the issues presented to this Court, but rather made his initial application for habeas corpus relief in the federal courts (TR 5, 11, 54-55).

B. Proceedings in the Federal Courts.

On September 27, 1966, the Honorable Alfonso J. Zirpoli, Judge of the United States District Court ordered

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1. "TR" refers to the transcript of record of the proceedings in the District Court.

that appellees file a return to the petition for habeas corpus which appellant had filed on July 13, 1967 (TR 1-11, 42). On October 20, 1967, appellees filed its return to said order to show cause, with accompanying exhibits (TR 53-59).

On November 14, 1967, the Honorable Alfonso J. Zirpoli caused to be filed an order directing appellees to make further return setting forth (1) whether and how petitioner's present confinement is in any way affected by his conviction of February 5, 1963, and (2) appellees' arguments on the merits of the petition for writ of habeas corpus (TR 74). The further return to the order to show cause and points and authorities in opposition pursuant to this order was filed by appellees on December 4, 1967 (TR 158-174).

The order denying the petition for writ of habeas corpus, discharging the order to show cause and dismissing the proceedings, signed by the Honorable Alfonso J. Zirpoli was filed on December 14, 1967 (TR 188-190). Notice of appeal was thereafter filed by appellant on January 31, 1968, however, the day preceding, the Honorable Alfonso J. Zirpoli issued an order granting a certificate of probable cause because "This Court finds that an appeal, to determine whether Arketa v. Wilson, 373 F.2d 582 (9th Cir. 1967) applies to the facts of this case,

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would not be frivolous," (TR 200).[2/] Appellant's opening brief was received in appellees' office on April 3, 1968.

APPELLANT'S CONTENTIONS

1. The District Court erred by not allowing appellant to traverse appellees' further return.

2. Appellant's confinement under the 1963 conviction would have expired had appellant not been illegally convicted in the 1966 proceeding now in question.

3. Appellant is in custody in violation of the United States Constitution and has no other remedy other than federal habeas corpus for relief.

SUMMARY OF APPELLEES' ARGUMENT

I. The court's failure to allow petitioner to traverse appellee's further return was not error, because 28 United States Code section 2243 does not guarantee to a habeas corpus applicant the right to traverse every pleading.

II. The District Court's finding that appellant's parole was revoked for cause independent of the 1966 conviction is supported by the record.

III. The instant petition does not come within the rule stated in Arketa v. Wilson.

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2. Appellant's notice of appeal was received by the Clerk of the United States District Court on January 12, 1968, two days before the expiration of the 30-day period allowed by 28 United States Code, section 2107 and Rule 73(a), Federal Rulesof Civil Procedure, however, it was not filed until January 31, 1968, one day after the District Court granted a certificate of probable cause. We surmise that the delay was not occasioned through the fault of appellant and for that reason, we do not press the timeliness issue.

ARGUMENT

I

THE COURT'S FAILURE TO ALLOW PETITIONER TO TRAVERSE APPELLEE'S FURTHER RETURN WAS NOT ERROR, BECAUSE 28 UNITED STATES CODE SECTION 2243 DOES NOT GUARANTEE TO A HABEAS CORPUS APPLICANT THE RIGHT TO TRAVERSE EVERY PLEADING.

The applicable part of 28 United States Code section 2243 states:

> "The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any of the material facts."

The word "may," of course, denotes a permissive condition and not a mandatory one. Solenoid Devices, Inc. v. Ledex, Inc., 375 F.2d 444, 445 (9th Cir. 1967). Appellant did traverse appellee's return to the order to show cause (TR 75-83). His only complaint is that he was not able to traverse the further return. A District Court may permit any of the parties to file supplemental pleadings - even after the writ has been granted, Gladden v. Gidley, 337 F. 2d 575, 577-578 (9th Cir. 1964) but there is no requirement that the opposing party be allowed to traverse. Furthermore, the writ was denied on a point of law rather than upon a factual determination going to the merits of the petition (TR 188-190). Therefore, a traverse to the further return was not only unnecessary, but it could have no influence whatsoever upon the ultimate resolution of the question of law presented.

II

THE DISTRICT COURT'S FINDING THAT APPELLANT'S PAROLE WAS REVOKED FOR CAUSE INDEPENDENT OF THE 1966 CONVICTION IS SUPPORTED BY THE RECORD.

Appellant's second argument (AOB 15-19), his heading notwithstanding, consists of an attack upon the factual basis of the parole officer's report upon which his parole was revoked. It is immaterial whether the facts did or did not exist as appellant suggests. What is material is that the revocation did occur as a result of this report - i.e., for cause shown. See Cal. Pen. Code § 3063, In re Costello, 262 F.2d 214, 215 (9th Cir. 1958); In re McLain, 55 Cal.2d 78, 87; 357 P.2d 1080 (1960). The fact that appellant was found guilty of the three charges, and that they constituted "cause" is all that is important to this Court. In re Costello, supra.

III

THE INSTANT PETITION DOES NOT COME WITHIN THE RULE STATED IN ARKETA V. WILSON.

The District Court granted a certificate of probable cause to determine whether Arketa v. Wilson, 373 F.2d 582 (9th Cir. 1967) applied to this case (TR 200). Appellant's final argument (AOB 19-22) is to the effect that this case does come within Arketa because, absent the 1966 conviction, he allegedly would be eligible for parole "immediately" (AOB 20).

Arketa does not aid appellant. That case involved a situation wherein the petitioner was attacking

the validity of his prior conviction. Against a McNally argument (McNally v. Hill, 293 U.S. 131 (1934)), this Court found that but for the prior conviction, petitioner would have been eligible for probation at the time of sentencing on the second conviction, and thus, petitioner should be allowed to attack the prior in federal habeas corpus. 373 F.2d 585. The court noted that in Martin v. Commonwealth of Virginia, 349 F.2d 781 (4th Cir. 1965) a similar step was taken in relation to a prisoner who claimed that, but for the invalid prior conviction, he would be eligible for parole under the later conviction. The court decided not to go so far, because in order to do so, it would, as did the Fourth Circuit, have to cast McNally aside with the rather presumptuous and illogical reasoning that if McNally were heard by today's Supreme Court, it would be decided differently. 373 F.2d 585. Appellant herein asks this Court to take that step and splinter the doctrine of stare decisis (AOB 20). This Court would not do so in Arketa, and it should not do so here.

We point to this language in Arketa, which quotes McNally:

> "'The petitioner asks here only a ruling which will establish his eligibility for parole, because of the invalidity of the sentence on the third count. The ruling sought is such as might be obtained in a

> proceeding brought to mandamus the parole board to entertain his petition for parole, if the sentence on the third count were void for want of jurisdiction of the court to pronounce it. This use of habeas corpus is unauthorized by the statutes of the United States* * * '" 373 F.2d at 584.

We submit that this language adequately disposes of appellant's desire to stretch the ruling of Arketa in reference to probation eligibility, to one in which the question presented is parole eligibility.

Appellant seeks to further distinguish this case from McNally by declaring that, unlike the federal petitioner therein, he does not have another remedy available to him (AOB 21). However, this appellant does have another remedy, Arketa v. Wilson, supra, 373 F.2d 585, 584, fn. 4, which he has specifically and intentionally by-passed (TR 5, 11, 54-55). Appellant hardly has presented his case in a posture conducive to the granting of the highly extraordinary relief he seeks. Cf. Walker v. Wainwright, 36 U.S.L.Week 3357 (1968).

Finally, we must note that the Martin case's spawn, Peyton v. Rowe and Peyton v. Thacker are presently before the United States Supreme Court. The continuing validity of McNally is the question before the court. We surmise that this Court may deem it propitious to await the outcome of that case before deciding this one.

However, for the present time, suffice it to say that the decision of the District Court in the light of prevailing law is manifestly correct. Ex Parte Hull, 312 U.S. 596 (1941) does not apply because appellee's parole was revoked for reasons other than the 1966 conviction. The lower court so found; the record supports that finding. Because of the prior, uncontested conviction, McNally v. Hill applies, and the order denying the writ so acknowledges that fact (TR 188-189). That order should be affirmed.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the District Court should be affirmed.

DATED: April 26, 1968

THOMAS C. LYNCH, Attorney General
of the State of California

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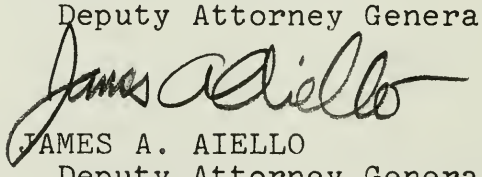

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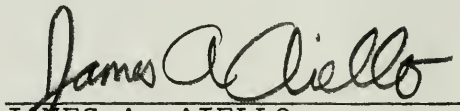
CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: April 26, 1968



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